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IN THE
Supreme Court of the United States

October Term, A. D. 1953

No. 228

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POT-
TAWATTAMIE COUNTY, IOWA, *Respondents.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE, *Respondent.*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY, *Petitioner,*

vs.

ARCHIE C. STUDE and WILLIAM LUMPKIN,
Respondents.

RESPONSE TO PETITION FOR REHEARING

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RESPONSE TO PETITION FOR REHEARING

ARGUMENT

I.

**Administrative proceedings before sheriff's
commissioners are not part of the substantive
right to condemn under Iowa law.**

Once again we are called upon to refute the same contention that the Petitioner has made unsuccessfully before three courts. Examination of the Petition for Rehearing reveals that the contention presented by the Petitioner is that it was required to follow the Iowa admin-

istrative procedure before the Sheriff before it had a right to condemn. In other words Petitioner insists that it could not maintain a federal court action without first following Iowa procedural law through the point of the award of the Sheriff's Commissioners. The Petitioner's theory has been and still is that there can be no "civil action" of federal cognizance until the state procedure is followed to the point of an appeal from the award. And once again the Petitioner attempts to sustain its position by citation of *removal* cases only as authority.

As we have so many times pointed out, in this court, as well as in the lower courts, the Petitioner confuses a substantive right or cause of action with the term "civil action" as used in the removal statute. It is true there can be no "civil action" pending in a state court for the purposes of removing a condemnation proceeding to the federal court, until the state proceeding reaches the point of judicial as distinguished from administrative status. But it does not follow that a condemnation case brought to enforce a power granted by the state substantive law may not be initiated in the federal court.

Under the procedure in the federal court as set forth in Rule 71A the substantive right or cause of action is docketed in the manner as set forth in Rule 71A as an action in rem against the land as to which notices are given, and thereafter there is a preliminary determination of the amount of damages. There is nothing unique about this method of procedure that cannot be complied with in the federal courts, since the procedure in substance is no different than that of referring a matter to a referee or any other type of preliminary determination. The fact

remains that a condemnation suit is a suit at common law of which the federal district courts have jurisdiction. This Court in an early declaration in the case of *Kohl vs. United States*, 91 U. S. 367, held that the fact that a condemnation proceeding is a suit admits of no question.

The Petitioner's position that it had no right to proceed in federal court until after the award of the sheriff's commissioners had been returned, could have validity only if the procedure before the sheriff was a condition to the right to condemn as distinguished from a mere integral part of the state remedy to enforce the power of condemnation granted to petitioner.

The State of Iowa has, by various statutes, granted to various entities the substantive right to condemn Iowa land for specified purposes. Among the Iowa statutes granting such power are those included in Chapter 471 of the Iowa Code of 1950 entitled, "EMINENT DOMAIN," which relates exclusively to the right to condemn. Certain sections of this chapter grant the right of condemnation to railroads which have satisfied the conditions imposed by the particular sections applicable thereto (Code Iowa 1950—Secs. 471.6-471.10, inclusive).

An entirely separate chapter of the Iowa Code sets out the *procedure* for condemnation in Iowa to enforce in the state courts the substantive rights of condemnation granted by the state including, but not limited to the substantive rights granted by Chapter 471. This remedial chapter is Chapter 472 of the Iowa Code of 1950 entitled, "PROCEDURE UNDER POWER OF EMINENT DOMAIN." Under the specific provisions of Sec. 472.1, the state procedure for condemnation, except as otherwise

provided "shall be in accordance with the provisions of this chapter." Hence the procedural remedy of Chapter 472 of the Iowa Code applies not alone to railroads but to all condemnors. Likewise, it applies not only to those given the right of condemnation by Chapter 471 but also to those given that substantive right by other Iowa statutes. See, for example, Code Iowa 1950, Secs. 297.6, 420.52, 420.60, 420.156, 468.1 and 468.7. In other words, Chapter 472 is in no sense tied in with Chapter 471 so as to condition the right or power to condemn on the maintenance of a proceeding before the sheriff. The right is entirely independent of the procedural remedy to enforce it.

In this instance the Petitioner proceeded under the power granted it by Sec. 471.9(3) and 471.10 of the Code of Iowa of 1950. Under the latter section, a railroad before instituting condemnation proceedings under Sec. 471.9 is required to apply in writing to the Iowa State Commerce Commission for permission to condemn. The Commission is required to give notice to the landowners and examine into the matter and report by certificate to the Clerk of the District Court of the county in which the land is situated, the amount and description of the additional land necessary for railroad use. Sec. 471.10 then provides: "whereupon the company shall have the power to condemn lands so certified by the Commission."

In this case the Petitioner having satisfied the above requirement and having received the authority of the Iowa State Commerce Commission to condemn could, we respectfully submit, immediately institute the proceeding, either under state or federal procedure. But the Petitioner could not start under state practice before the sher-

iff and then cut across to the federal court by way of an appeal from the award of the sheriff's commissioners and thereby obtain federal review of the award of the commissioners. That is exactly what the Petitioner attempted to do. That is what the decision of this court says it may not do. The power to condemn became absolute when the Petitioner received the approval of the Iowa State Commerce Commission. There is no requirement as a condition to the right to condemn under Iowa law that the matter of damages be submitted to Sheriff's Commissioners before the substantive right exists.

II.

Condemnation under Iowa law involves a single cause of action and cannot be separated into a proceeding for acquiring the land and a proceeding for determining damages.

It is apparent that Petitioner has attempted to separate the procedure under Iowa law into two separate actions, one of which is an administrative action and is not within the jurisdiction of the Federal Court, and the other is the appeal which Petitioner claims is subject to the jurisdiction of the Federal Court. The fact is that the entire substantive right of action is set forth in Chapter 471 of the Code of Iowa, 1950, I. C. A., and involves a single substantive right, which under Iowa procedure is enforced by a preliminary administrative proceeding and thereafter the docketing of a civil action by way of appeal. The federal procedure set forth in 71A provides for the docketing of the civil action before the preliminary assessment is made. Therefore, there is only a single substantive right or cause of action which cannot be separated, as the Petitioner has attempted to do. At all

stages the proceeding remains a condemnation action. Petitioner cannot appeal from the award, which would otherwise be final under State law, directly to the federal district court.

As stated in *Mason City and Fort Dodge Railroad Company vs. Boynton*, 1907, 204 U. S. 570, 579, 580:

" . . . Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay over until the determination of the appeal. Section 2010 (Code of Iowa, 1950, I. C. A., Sections 472.25, 472.28, 472.29).

"Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. *The land is not lost until the owner is paid.*" (Emphasis added.)

The procedure for acquiring title by a condemnor is set forth in Section 472.36, Code of Iowa, 1950, I. C. A., which directs the clerk of the district court to file copies of the record entries as to the amount of damages and a statement showing the payment of the amount set. Section 472.41, Code of Iowa, 1950, I. C. A., provides that such record shall be presumptive evidence of title in the condemnor.

Furthermore, Section 472.32, Code of Iowa, 1950, I. C. A., also provides that upon being furnished with a copy of the assessment as determined on appeal the sher-

iff may remove the condemnor from the premises unless the amount is forthwith paid. Section 472.34 further provides that should the applicant decline to pay the final award he shall pay in addition to the costs and damages actually suffered by the landowner, reasonable attorney's fees to be taxed by the Court.

It follows that the Complaint filed by Petitioner is not a simple civil action for damages. Of necessity, Petitioner's Complaint is an appeal, since under the Iowa law set forth Section 472.17, Code of Iowa, 1950, I. C. A., the appraisal of damages returned by the Commissioners is final unless appealed from. Also, in the opinion by Mr. Justice Holmes in the Boynton case, *supra*, this Court analyzes the question of condemnation generally and the Iowa statutes specifically, and points out that a condemnation proceeding is a unique type of action and that both parties are actors and that it is not true that only the element of damages is involved.

The complaint in this case can be viewed only as an attempted appeal to review an award of damages made by the Sheriff's Commissioners. Under the above Iowa procedural statutes the award of damages by the Sheriff's Commissioners becomes final in the absence of an appeal. Obviously the petitioner had in mind perfecting an appeal. Otherwise the commissioners' award would become final. It is true the Petitioner, realizing the weakness of its position, likewise took an appeal to the state court which would have the effect of staying the finality of the award, but the nature of the complaint herein must be determined without regard to the other attempted appeal and removal which has apparently now been fully abandoned.

Furthermore a condemnor does not obtain title to the land condemned until the payment is made to the landowner. Condemnation is not completed until the landowner is paid and the title passes to the condemnor.

An examination of the complaint filed by the Petitioner herein discloses that, stripped of its references to the administrative procedure, it alleges nothing and seeks no relief. It is tied up to the Sheriff's proceedings and regardless of what it is called, it seeks merely to review the amount of the commissioners' award. It recognizes title as remaining in the landowners and thereby recognizes that the condemnation has not been completed. Even if, as Petitioner contends, this were merely an in personam action involving a determination of amount of damages, and even if the federal courts had jurisdiction of such an action, still the award of the Sheriff's Commissioners became final and the action in federal court would be moot.

CONCLUSION

We respectfully submit that there is nothing in the Petition for Rehearing that has not been urged continuously by the Petitioner and that has not been fully considered in all the courts, and decided by the courts. And each court, including this one, has found Petitioner's position to be untenable. The Petition for Rehearing points to no error in the decision of this court, and there is none. Contrary to the contention of Petitioner, this court did not disregard any controlling questions involved. The court merely refused to adopt the Petitioner's theory that because state procedural law provides for an admin-

istrative proceeding before a condemnation case is lodged in the state district court, the administrative proceeding is a condition precedent to the enforcement of the power of eminent domain in the federal court. *Iowa provides state procedural law and the United States provides federal procedure. Neither has provided for an appeal to the federal court from an award of the Sheriff's Commissioners made in a state initiated condemnation proceeding.* The commissioners' award is a step prescribed in state enforcement of the substantive right of condemnation, not a condition limiting the right to condemn.

We respectfully submit that the petition for rehearing should be overruled and rehearing denied.

Respectfully submitted,

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